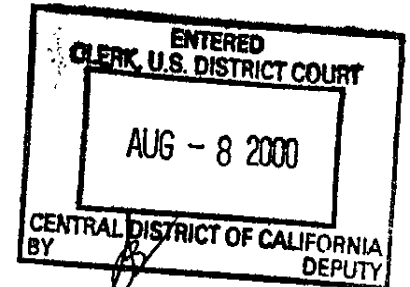
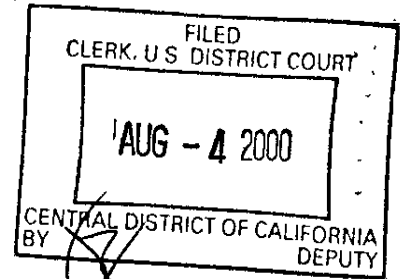


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DATED: August 4, 2000

Sharon R. Valley  
DEPUTY CLERK



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

IRA VINCENT SPEARMAN,

Petitioner,

vs.

UNITED STATES,

Defendant.

CASE NO. CV 00-2085 DT ✓

CASE NO. CR 93-1027 DT

ORDER **DENYING** DEFENDANT'S MOTION  
TO VACATE CONVICTION UNDER 28  
U.S.C. § 2255

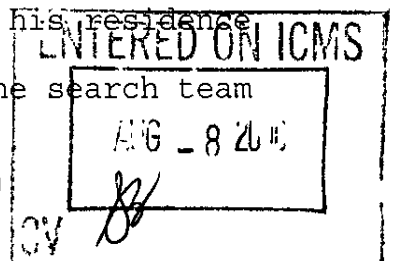
**Background**

**A. Factual Summary**

Ira Vincent Spearman ("Defendant") had been convicted of a previous felony. (09/01/94 RT 64-65, 72.) On October 25, 1993, Defendant's probation officer, Los Angeles County Deputy Probation Officer Madeline Kopp, and law enforcement officers conducted a probation search of Defendant's residence.

Prior to conducting the search, officers observed Defendant for several hours. Deputy Kopp and other members of

the search team approached Defendant when he exited his residence through the back door. He provided the keys that the search team



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1 used to enter. During a preliminary sweep, no other occupants  
2 were found. During the sweep, Deputy Kopp and Special Agent  
3 ("SA") Brad Galvan of the Bureau of Alcohol, Tobacco, and  
4 Firearms ("ATF") saw several baggies containing rock cocaine on  
5 top of an entertainment center in the living room. In the  
6 kitchen, they saw a gun. In the master bedroom, they saw what  
7 appeared to be drugs and a large amount of cash in plain view.  
8 (08/31/94 RT 55-56, 70-71; 09/01/94 RT 77-78).

9 After making these observations, SA Galvan and Deputy  
10 Kopp went outside to speak with Defendant. Defendant was advised  
11 of and waived his Miranda rights. He claimed that he had  
12 purchased the weapons found in his home "on the streets."  
13 Although he knew that his prior felony convictions prohibited him  
14 from possessing guns, he felt that he needed them "for  
15 protection." (08/31/94 RT 56-58; 09/01/94 RT 79-88, 94-95).

16 Agents then conducted a thorough search of Defendant's  
17 residence. This search yielded several grams of cocaine, three  
18 loaded guns and ammunition, thousands of dollars in cash, pay/owe  
19 sheets, and an Ohaus triple-beam scale.

#### 20 B. Procedural Summary

21 On December 3, 1993, a federal grand jury returned a  
22 three-count indictment charging defendant with possession with  
23 intent to distribute approximately 59.39 grams of cocaine base,  
24 in violation of 21 U.S.C. § 841(a)(1); use of three firearms  
25 "during and in relation to" the charged narcotics trafficking  
26 offense, in violation of 18 U.S.C. § 942(c); and possession of a  
27

1 | firearm after being convicted of the felonies of robbery,  
2 | unlawful sexual intercourse with a minor, possession of a  
3 | controlled substance, and possession of cocaine for sale, in  
4 | violation of 18 U.S.C. § 922(g). (CR 1).

5 |         On August 30, 1994, Defendant's jury trial commenced.  
6 | (CR 59).

7 |         On September 6, 1994, the jury returned a verdict of  
8 | guilty on all counts. (CR 69).

9 |         On May 15, 1995, the Court sentenced Defendant. The  
10 | Court imposed the mandatory sentence of life in prison on the  
11 | drug trafficking conviction plus a consecutive 60-month term of  
12 | imprisonment on the conviction for using a firearm during and in  
13 | relation to the drug trafficking. In addition, the Court  
14 | sentenced Defendant to 120 months in prison for the felon in  
15 | possession conviction to be served concurrently with the life  
16 | term. (CR 111; 05/15/95 RT 1-43).

17 |         Defendant then appealed his conviction. In a  
18 | memorandum disposition filed on September 3, 1996, the Ninth  
19 | Circuit affirmed Defendant's convictions for possession with  
20 | intent to distribute cocaine base and felon in possession of a  
21 | firearm, reversed Defendant's conviction for using or carrying a  
22 | firearm during and in relation to a drug trafficking crime and  
23 | remanded the case for resentencing.

24 |         On May 12, 1997, this Court held a hearing during which  
25 | it filed and spread its mandate and was prepared to reimpose the  
26 | life sentence. At the hearing, Defendant requested a new  
27 |  
28 |

1 attorney, which the Court denied. (CR 123). However, the Court  
2 granted defendant's request for a continuance of the resentencing  
3 hearing until June 2, 1997.

4 At a June 2, 1997, hearing, the Court continued  
5 Defendant's resentencing until July 7, 1997, and ordered the  
6 probation office to prepare an updated probation report. (CR  
7 126).

8 On June 27, 1997, at the parties' request, the Court  
9 granted a continuance of Defendant's resentencing date to July  
10 28, 1997, in order to allow the parties time to respond to the  
11 supplemental presentence report. (CR 127).

12 On July 25, 1997, Defendant requested a one-week  
13 continuance of the sentencing date in order to allow him time to  
14 try to find an expert who would testify regarding personal use of  
15 cocaine base. (CR 130). That same day, the Court denied  
16 Defendant's requested continuance. (CR 131).

17 On July 28, 1997, the court sentence Defendant to life  
18 in prison on the drug trafficking conviction and 120 months to be  
19 served concurrently on the felon in possession conviction. (CR  
20 134).

21 Defendant appealed the sentence imposed. On January  
22 14, 1999, the Ninth Circuit affirmed the sentence.

23 On February 29, 2000, Defendant filed a petition  
24 pursuant to 28 U.S.C. § 2255 seeking to overturn his conviction  
25 or in the alternative to vacate his sentence. This petition is  
26 currently before this Court.

1 **II. Discussion**

2 **A. Standard**

3 Any prisoner in custody under sentence of a federal  
4 court may file a motion

5 claiming the right to be released upon ground that the  
6 sentence was imposed in violation of the Constitution  
7 or the laws of the United States, or that the court was  
8 without jurisdiction to impose such sentence, or that  
9 the sentence was in excess of the maximum authorized by  
10 law, or is otherwise subject to collateral attack.

11 22 U.S.C. § 2255.

12 In such a motion, the prisoner "may move the court  
13 which imposed the sentence to vacate, set aside or correct the  
14 sentence." Id. The petitioner has the burden of proving that  
15 his sentence is invalid in a Section 2255 motion. United States  
16 v. Edmonson, 922 F.Supp. 505 (D.Kan. 1996), aff'd 107 F.3d 22  
17 (10th Cir. 1997), cert. denied, 521 U.S. 1128, 117, S.Ct. 2531,  
18 138 L.Ed.2d 1030 (1997).

19 Unless the motion and the files and records of the  
20 case conclusively show that the prisoner is entitled to  
21 no relief, the court shall cause notice thereof to be  
22 served upon the United States attorney, grant a prompt  
23 hearing thereon, determine the issues and make findings  
24 of fact and conclusions of law with respect thereto.

25 If the court finds that the judgment was rendered  
26 without jurisdiction, or that the sentence imposed was  
27

1 not authorized by law or otherwise open to collateral  
2 attack, or that there has been such a denial or  
3 infringement of the constitutional rights of the  
4 prisoner as to render the judgment vulnerable to  
5 collateral attack, the court shall vacate and set the  
6 judgment aside and shall discharge the prisoner or  
7 resentence him or grant a new trial or correct the  
8 sentence as may appear appropriate.

9 A court may entertain and determine [a habeas  
10 corpus] motion without requiring the production of the  
11 prisoner at the hearing. . . .

12 An application for a writ of habeas corpus in  
13 behalf of a prisoner who is authorized to apply for  
14 relief by motion pursuant to this section, shall not be  
15 entertained if it appears that the applicant has failed  
16 to apply for relief, by motion, to the court which  
17 sentenced him, or that court has denied him relief,  
18 unless it also appears that the remedy by motion is  
19 inadequate or ineffective to test the legality of his  
20 detention.

21 28 U.S.C. § 2255.

22 **B. Analysis**

23 In his petition, Defendant argues (1) that the district  
24 court allowed the introduction into evidence of several pay/owe  
25 sheets that were not properly authenticated, claiming that the  
26 court allowed improper expert testimony regarding handwriting;

1 (2) that the district court did not conduct sufficient  
2 evidentiary hearings to determine whether a portion of the drugs  
3 found at Defendant's apartment were for personal use; and (3)  
4 that his counsel was ineffective regarding the previous issues  
5 raised and for failing to call his sister as a witness.

6 In the opposition to Defendant's petition, the  
7 Government argues that these claims are procedurally barred and  
8 lack merit.

9 1. Defendant's Claim Regarding The Pay/Owe Sheet  
10 Evidence Is Procedurally Barred Because He Can  
11 Neither Show Cause For His Procedural Default Nor  
12 Demonstrate Prejudice Arising From The Claimed  
13 Error.

14 Defendant claims that the Court allowed several pay/owe  
15 sheets to be introduced into evidence when they were not properly  
16 authenticated. However, Defendant did not raise this claim on  
17 direct appeal. Failure to raise a claim at trial or on direct  
18 appeal will generally result in the waiver of the claim. See  
19 United States v. Frady, 456 U.S. 152, 162-66, 102 S.Ct. 1584,  
20 1592-93, 71 L.Ed.2d 816 (1982). Grounds which were apparent when  
21 the appellant originally appealed his conviction cannot be made  
22 the basis for another attack on the conviction by a motion to set  
23 aside the judgement. See Hammond v. United States, 408 F.2d 481,  
24 483 (9th Cir. 1969).

25 An exception to the defendant's waiver of claims that  
26 were not raised earlier exists where the defendant is able to (a)

1 show cause for the procedural default and (b) demonstrate  
2 prejudice arising from the claimed error. See Murray v. Carrier,  
3 477 U.S. 478, 485-86, 106 S.Ct. 2639, 2644, 91 L.Ed.2d 397  
4 (1986). Pursuant to this test, review of waived claims is barred  
5 unless the prisoner can demonstrate cause for the default and  
6 actual prejudice as a result of the alleged violation, or  
7 demonstrate that failure to consider the claims will result in a  
8 fundamental miscarriage of justice. See Frady, 456 U.S. at 167-  
9 69.

10           During the trial, Defendant's counsel properly cross-  
11 examined the government's witnesses concerning the pay/owe  
12 sheets, arguing to the jury that their testimony did not prove  
13 that Defendant actually wrote them. Defendant does not offer an  
14 explanation for his failure to raise the issue of the sheets'  
15 authenticity on direct appeal. Because he does not provide an  
16 explanation for this omission, Defendant has not shown cause for  
17 his procedural default.

18           Defendant claims that the pay/owe sheets were  
19 improperly authenticated because a non-expert performed  
20 handwriting analysis. Fed. R. Evid. 901(a) provides that the  
21 requirement of authentication is satisfied by "evidence  
22 sufficient to support a finding that the matter in question is  
23 what its proponent claims." Fed. R. Evid. 901(a). In this case,  
24 the Government presented expert testimony to prove that the  
25 exhibits in question were actually pay/owe sheets. Defendant  
26 does not dispute the accuracy of this testimony. Instead, he  
27  
28



1 argues that the court admitted improper testimony regarding his  
2 handwriting.

3 Exhibit 15D was a Fernando's Lumber Receipt that was  
4 found in the nightstand next to Defendant's bed. Exhibit 16D was  
5 a pink notebook that was found on the dresser in Defendant's  
6 bedroom. The government did not present any testimony pertaining  
7 to the handwriting on either of these items. Instead, the  
8 government's expert witness testified that they were actually  
9 pay/owe sheets. Both sheets were admissible as evidence not  
10 because they were written by Defendant, but because they was  
11 found in Defendant's bedroom during a search of his residence and  
12 because they were found in the presence of large quantities of  
13 cash and other evidence of drug trafficking activity.

14 The government also introduced another pay/owe sheet  
15 written on the back of a probation department notice report  
16 containing Defendant's name. The government's witness testified  
17 that the name signed on this document appeared to be "Ira  
18 Spearman," but he did not affirmatively state that the signature  
19 was Defendant's. Like the other two pay/owe sheets, it was  
20 properly admitted because it was found during the search of  
21 Defendant's home. Thus, Defendant cannot demonstrate that actual  
22 prejudice resulted from the alleged violation of the evidence  
23 rule. Consequently, because Defendant does not meet the  
24 requirements of the exception to his waiver of claims as set  
25 forth in Murray v. Carrier, supra, this Court finds that  
26 Defendant's claim concerning the pay/owe sheet evidence is  
27 procedurally barred.

2. Defendant's Claim Regarding His Personal Use of Crack Cocaine Is Procedurally Barred Because This Claim Was Adjudicated Previously On Direct Appeal.

Defendant claims that the district court did not conduct sufficient evidentiary hearings to determine whether a portion of the drugs found at Defendant's apartment were for personal use. However, a Section 2255 motion is precluded if it raises claims that were previously decided on direct appeal. See United States v. Currie, 589 F.2d 993, 994 (9th Cir. 1979).

"Although principles of res judicata do not bar a prisoner from relitigating on habeas corpus or under § 2255 or on coram nobis issues raised in the original appeal, a district court may refuse to entertain a repetitive petition absent a showing of manifest injustice or a change in the law." Polizzi v. United States, 550 F.2d 1133, 1135 (9th Cir. 1976).

Defendant has raised this issue previously both at trial and on direct appeal. At those times, Defendant cited United States v. Kipp, 10 F.3d 1463 (9th Cir. 1993), which held that a district court must subtract the quantity of drugs that a defendant possessed for personal use from the quantity that he or she possessed for sale during sentencing for violation of 21 U.S.C. § 841. There has been no subsequent change in the law. The government did not dispute the holding of Kipp. Rather, the government demonstrated its inapplicability to this case by proving that Defendant possessed all of the cocaine base found in his residence for sale, not for personal use. On appeal, the Ninth Circuit found the government's proof "overwhelming."

1 Therefore, since Defendant does not show manifest injustice or a  
2 change in the law, this Court finds that the issue of personal  
3 use is precluded.

4           **3. Defendant's Ineffective Assistance of Counsel**  
5           **Claim Is Without Merit Because He Does Not**  
6           **Identify Objectively Unreasonable Behavior.**

7           Defendant claims that his counsel was ineffective for  
8 failing to raise claims (1) and (2) and for failing to call his  
9 sister as a witness. The Supreme Court set forth the standard  
10 for ineffective assistance of counsel claims in Strickland v.  
11 Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).  
12 "When a convicted defendant complains of the ineffectiveness of  
13 counsel's assistance, the defendant must show that counsel's  
14 representation fell below an objective standard of  
15 reasonableness." Strickland, 466 U.S. at 687-88, 104 S.Ct. at  
16 2064 (citations and internal quotations omitted). The  
17 reasonableness of counsel's challenged conduct must be judged  
18 according to the standards "as of the time of counsel's conduct,"  
19 not the standards prevailing at the time the challenge is  
20 brought. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. In  
21 addition, "any deficiencies in counsel's performance must be  
22 prejudicial to the defense in order to constitute ineffective  
23 assistance under the Constitution." Strickland, 466 U.S. at 692,  
24 104 S.Ct. at 2067.

25           Defendant has not identified any behavior that "fell  
26 below an objective standard of reasonableness." First, Defendant  
27 cannot demonstrate that either his trial counsel or his appellate  
28

1 counsel was ineffective regarding treatment of the pay/owe sheet  
2 evidence. His trial counsel, Deputy Federal Public Defender  
3 Gerald Salseda, objected to this evidence during the trial, but  
4 his objection was properly overruled by the court. Defendant's  
5 appellate counsel did not raise this issue on direct appeal  
6 because it lacked merit.

7 Second, Defendant cannot demonstrate that his counsel  
8 was ineffective regarding his statement that the cocaine found in  
9 his residence was purchased for his personal use. His appellate  
10 counsel has raised this claim previously on direct appeal. In  
11 response, the Ninth Circuit found that Defendant was unable to  
12 demonstrate prejudice. The court decided that:

13 In light of the abundant evidence...supporting the  
14 court's determination that the drugs found in Spearman's  
15 apartment were not for personal use, we cannot say that the  
16 absence of expert testimony on the personal use was  
17 prejudicial. See United States v. Schaflander, 743 F.2d  
18 714, 719-720 (9th Cir. 1984) (holding that there is no  
19 reasonable probability of prejudice when there is  
20 overwhelming evidence to the contrary).

21 Memorandum Disposition at 5-6. Defendant does not present any  
22 new information to convince this Court that this claim deserves  
23 further consideration.

24 Third, Defendant cannot demonstrate that his trial  
25 counsel was ineffective for failing to call his sister as a  
26 witness. Mr. Salseda interviewed Ms. Spearman, Defendant's  
27 sister, before the trial. According to Assistant United States  
28

1 Attorney Julie A. Ryan, Mr. Salseda consciously decided not to  
2 call her as a witness because he believed that her testimony  
3 would be harmful to the defense. See Ryan Decl. at ¶ 3. Based  
4 on her pre-trial interview, Mr. Salseda believed that her  
5 testimony would contradict the affidavit that she had prepared.  
6 See id. Defendant has not provided adequate evidence to prove  
7 that Ms. Salseda's testimony at the trial would have been  
8 consistent with her affidavit.

9 Furthermore, as the opposition indicates, even if Ms.  
10 Spearman had testified consistently with her affidavit, the  
11 jury's verdict in this case would probably not have been  
12 different. This testimony would have conflicted with both the  
13 physical evidence in the case and Defendant's own statement. For  
14 example, in her affidavit, Ms. Spearman claims that her friend  
15 Ragtime "ask[ed] could [she] hold three guns" for him. However,  
16 Defendant had previously told SA Galvan and Deputy Kopp that he  
17 had purchased the guns for his own protection. Thus, because  
18 Defendant's counsel's behavior was not objectively unreasonable  
19 in any of the three situations that he identifies, this Court  
20 finds that Defendant's ineffective assistance of counsel claim is  
21 without merit.

22 ////

23 ////

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26 ////

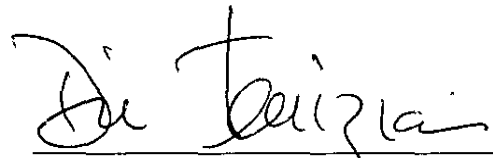
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1        **C. Conclusion**

2                Based on the foregoing discussion, as well as the  
3 reasons set forth and incorporated by reference herein in the  
4 Government's Opposition to Defendant's Motion to Vacate, Set  
5 Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, this  
6 Court hereby **DENIES** Defendant's Motion to Vacate Conviction under  
7 28 U.S.C. § 2255.

8                IT IS SO ORDERED.

9  
10        DATED: 8/4/2000



\_\_\_\_\_  
Dickran Tevrizian, Judge  
United States District Court